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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JENNIFER ANNE JOY,

Defendant and Appellant.

D051910

(Super. Ct. No. SCD203857)

APPEAL from a judgment of the Superior Court of San Diego County, Julia Craig Kelety, Judge. Reversed.

A jury found Jennifer Anne Joy guilty of (1) residential burglary in violation of Penal Code¹ sections 459 and 460 (count 2); (2) grand theft in violation of section 487, subdivision (a) (count 3); (3) false personation in violation of section 529.3 (count 8); and

¹ All further statutory references are to the Penal Code unless otherwise specified.

(4) possession of methamphetamine in violation of Health and Safety Code section 11377, subdivision (a) (count 9). The jury found her not guilty of six remaining counts.

The court sentenced Joy to the lower term of two years as to count 2 and concurrent terms of one year four months as to counts 3 and 9. It sentenced her to one year four months as to count 8, but stayed that sentence under section 654.

Joy appeals, contending (1) the court violated her Fourteenth Amendment right to a fair trial by allowing the jury to see her shackled in a waist chain and handcuffs without showing a manifest need, deferring the decision to the bailiff, and failing to sua sponte instruct the jury with respect to the shackling; (2) the court abused its discretion when it failed to grant her motion for continuance because she had shown good cause that exculpatory third party culpability evidence in Riverside was vital to her defense; (3) the court denied her a fair trial when it admitted evidence of a "voluntary statement" she signed at Home Depot, which was not provided to defense counsel until after the trial began; (4) the trial court abused its discretion when it denied her new trial motion after defense counsel presented newly discovered evidence that exonerated her; and (5) the cumulative prejudicial effect of the multiple errors deprived her of her federal right to due process and requires reversal of the judgment of conviction. We conclude the court prejudicially abused its discretion and violated Joy's constitutional rights to due process and a fair trial by allowing her to be shackled in view of the jury during the morning session of the first day of trial, by deferring to the bailiff with respect to the decision

regarding restraints, and by not sua sponte instructing the jury that the shackles had no bearing on the determination of Joy's guilt.² Accordingly, we reverse the judgment.

FACTUAL BACKGROUND

A. The People's Case

Jill Degnan and Carolyn Pirro owned a duplex on 32nd Street in San Diego. Degnan lived in the upstairs unit, and Pirro lived downstairs in a studio unit. Pirro also owned the adjoining downstairs duplex unit, which she rented out to Cheryl Cox.

In 2003 Joy and Pirro, who were partners from 2001 to July 2005, moved into a house in Lemon Grove. Joy has two children, and Pirro had been a part of their lives for six years.

Joy ended her relationship with Pirro in July 2005, and, although the two women saw each other thereafter, Pirro moved out of the Lemon Grove house and returned to the 32nd Street studio. Pirro permitted Joy and her children to stay at the Lemon Grove house until December 2006 so that Joy could receive drug treatment.

On December 13, 2006, Pirro, through a friend, gave Joy a notice to quit the Lemon Grove house within three days. Pirro also cut Joy off financially in December 2006 because Pirro had no money left to give her.

On December 31, 2006, Pirro was at the Lemon Grove house making sure there was no drug activity at her house on New Year's Eve. Joy came to the house to get some

² Because reversal is required with respect to the shackling issue, which is dispositive, we need not, and do not, reach the remaining issues.

of her personal belongings and left five to 10 minutes later. After Joy left, Pirro noticed that her cell phone, which had been on the table charging, was missing. After going through a small duffel bag to get information she needed to call the cell phone company to cancel her cell phone, Pirro noticed that some items—such as her passport, a military ID, some Dave & Buster's cards, a Home Depot credit card, and a Wells Fargo credit card—were missing from her bag.

Pirro's Lemon Grove home was burglarized on either the evening of December 31, 2006, or the morning of January 1, 2007,³ but she did not report it to the police. The thief stole all of her change, and a lot of paperwork, including her bank statements, veteran's paperwork and retirement information, was missing.

On January 1 Pirro went to Home Depot to report her credit card was missing. In the past, Pirro had allowed Joy to use the Home Depot card for purchases. Pirro did not report the Wells Fargo card missing because it was already maxed out.

On January 2 Pirro returned to work, parked her Kia Sportage in the parking lot, and locked the doors. After attending a meeting until about 3:00 or 3:30 p.m., she went outside to get something to eat and found her car was no longer in the parking lot. Pirro called the police to report the vehicle had been stolen, but she was transferred to other departments because she suspected Joy took the car, and the police considered the car taken without permission, not stolen. Pirro was never able to report the vehicle stolen.

³ All further dates are to calendar year 2007.

1. *January 2-3: Degnan's residence*

Meanwhile, on January 2, Degnan went out for the night. She locked all the doors and windows before she left. When Degnan returned to her residence in the early afternoon on January 3, she noticed that some beer was missing from the refrigerator and suspected that someone had been in her house. She found that change kept in a bucket and \$5 bills in the amount of about \$400, which had been in the hall closet, were missing. Some distinctive jewelry pieces and a laptop computer were also missing. Degnan did not notice any sign of a forced entry into the house, so she feared the thief had a key. Degnan called Pirro to warn her that someone had broken into the house. Pirro said, "Oh my God. I'm really sorry. It was [Joy]. I'm sure of it."

2. *January 3: Home Depot*

On January 3 at around 6:00 p.m., Marcos Vocal, a loss prevention investigator at the Home Depot on Sports Arena Boulevard, was drawn to Joy, who was pushing a shopping cart containing lots of hardware items. Vocal and another loss prevention investigator, Oscar Hernandez, followed Joy around the store for about 20 minutes. Vocal suspected that Joy would shoplift because she had a large number of high-priced items in her cart. Joy also drew attention because she was quickly, randomly grabbing merchandise without careful consideration.

Vocal alerted Adriana Mercado, the head cashier, of his suspicions and instructed her to double-check Joy's identification and form of payment. Joy went to the checkout register seeking to purchase various tools such as a multitool, an inflator, a saw, two sets

of wrenches, a set of pliers, a hammer, a staple gun, a cordless drill, a power saw, a buffer, and some batteries. The total price of the items was \$625.78.

To purchase the merchandise, Joy presented a Home Depot credit card and a California driver's license. However, as the license was expired, Mercado asked Joy for another form of identification. Joy provided a military ID and a passport. The name on all forms of identification and the Home Depot card matched; they were under the name of Carol Pirro or Carolyn Pirro. However, the photos on the identification did not look like Joy. Hernandez told Mercado to swipe the credit card. The computer prompted them for authorization because the card either exceeded the credit limit or had been reported lost.

The credit center contacted Pirro. When Vocal spoke with her, Pirro informed him that the card had been stolen three days before, and she had not authorized anyone to use the card. In the meantime, when asked about the card being reported lost, Joy claimed she had lost the card the prior year. As the employees tried to verify Pirro's address, Joy gave Pirro's Social Security number and address.

Joy told the employees she would leave the credit card there and come back to pick up her items later. As a stalling tactic, Joy was sent to special services to leave the items on will call so she could pick them up later. The items were rung up again, the credit card Joy had presented was swiped again, and a credit card slip was produced. Joy signed the credit card slip and tried to leave the store with the merchandise. The signature on the credit card slip did not match the signature on the passport.

Vocal went to the front of the store, stopped Joy, identified himself as Home Depot security, and tried to take her to the back of the store. Joy tried to flee towards the door, but Vocal jumped in front of her and stopped her. Eventually, Joy was placed in handcuffs and escorted to the loss prevention office. There, Vocal directed a female Home Depot employee to search Joy because he had seen her with a pocketknife while she was shopping. The pocketknife was found in her right pocket, and a baggie containing a white substance resembling crystal methamphetamine (later tested and found to be a usable amount), as well as a pipe, were found in her back pocket. These items and the purse Joy was carrying were later turned over to the police. Inside the purse were 11 earrings and a bracelet. The keys to Pirro's car were also recovered from Joy. When Vocal asked Joy why she took the items from the store, she replied, "Angry."

Hernandez filled out a voluntary statement form that described what happened, and he informed Joy she did not need to sign the form. Joy signed the form.

Pirro went to the Home Depot store after she received a phone call from the store informing her that someone was trying to use her card. Pirro met with police officers who handed her a black purse that Joy had been carrying in the store. Inside the purse, Pirro found her passport, ID, Dave & Buster's cards, and other items that had been taken from the Lemon Grove house. Pirro also found inside the purse earrings she believed belonged to Degan.

Pirro saw Joy at the Home Depot and, based on her experience as a substance abuse counselor, thought Joy appeared to be high on drugs. In the past, Pirro had given permission to Joy to use the Home Depot card to buy items for the Lemon Grove house.

However, Pirro did not authorize Joy to use the card on January 3 to make the \$625.78 in purchases she tried to make. Pirro did not recognize the signature on the Home Depot receipt, and the signature was not hers. Neither she nor Joy was working on any home improvements projects at that time, and she would not have asked Joy to buy anything for her at this time because Joy "wasn't in her right mind. She wasn't the same person."

When Pirro left Home Depot and went to the parking lot, she found her car, which had been taken from her workplace the previous day. Pirro found a cell phone, a big man's jacket, and a set of keys on the front seat. The keys were the missing keys to Degnan's residence. Pirro reported her findings to the police, and she eventually gave the key to Degnan's home to a detective. Later that day, Pirro spoke to Degnan and told her that Joy had been arrested at the Home Depot while using a stolen credit card, and a bag of jewelry had been recovered from her.

The next day Degnan met with a detective who showed her the jewelry. Degnan recognized earrings her sister had given her, some hoop earrings and diamond earrings that were part of a set her father had given her.

3. January 9

On January 9 Degnan was awakened at around 6:00 or 6:30 a.m. by some noise coming from downstairs. Degnan went outside on her porch and saw that one of the screens was bent and half removed, and she could hear someone downstairs. Degnan called Cox and told her she thought someone was trying to break in downstairs. Degnan asked Cox to look under her balcony because Degnan heard noises by the windows. Cox got out of bed, walked out onto the balcony, and looked downstairs. She saw Joy

standing at the garage window, trying to pry it open. Joy was digging at the window with some object. Cox also noticed that all of the screens on the back side of the house had been pried up. Cox told Degnan it was Joy and then asked Degnan to call 911. Joy made eye contact with Cox and ran away. Cox exclaimed, "She's running away," and Degnan called the police.

As these events were happening, Pirro was asleep in her studio. Because of her work schedule, she did not go to bed until 4:00 a.m. and did not go to work until noon. Pirro did not recall hearing any knocking, banging, or phones ringing at 6:45 a.m. that day. Cox later told Pirro that Joy had tried to come in through Pirro's window.

Pirro, Degnan and Cox later inspected the pried-out window screen. They noticed that all nine screens appeared as if someone had tried to get into them. Degnan and Cox also went to the garage where Degnan had heard the noise. They saw that someone had stuck something inside the deadbolt, and it had been jammed. They also found scrape marks along the garage doorjamb. Cox found a pair of black high-top tennis shoes in the carport area that Pirro had given to Joy as a Christmas gift and that Cox had previously seen Joy wear.

Pirro had not made any arrangements with Joy for her to come by the house either on January or a few days before or after that date to drop off or pick up anything.

B. The Defense

Joy testified in her own defense. She denied ever being in Degnan's home, let alone stealing anything from there. She stated she did not use the black purse and had no idea that the jewelry was in it. She took Pirro's car with Pirro's consent after she spoke

with Pirro several times on her cell phone. Joy claimed she had her own set of keys to Pirro's Kia, and she had used the car over 100 and possibly 200 times. She often took the Kia from the parking lot at Pirro's workplace.

Joy also claimed she went to Home Depot at Pirro's request to buy items to fix up the Lemon Grove house for sale. Joy found the Home Depot credit card in the center console of the Kia, where it was normally kept. She explained that she attempted to flee from Home Depot security because of the drugs she had in her pocket.

Joy also testified she went to Pirro's home on 32nd Street on January 9 because she wanted to get the cell phone she had left in the Kia and because she needed the boots to wear to a court appearance later that day. She knocked on Pirro's door for 20 minutes, but Pirro would not answer the door. Joy then tried to enter through Pirro's window.

DISCUSSION

I. *SHACKLING*

Joy first contends the court violated her Fourteenth Amendment right to a fair trial by allowing the jury to see her shackled in a waist chain and handcuffs without showing a manifest need, deferring to the bailiff in deciding whether she should remain shackled, and failing to sua sponte instruct the jury with respect to the shackling. We conclude the court committed reversible error by (1) allowing Joy to be shackled within view of the jury during the morning session of the first day of trial, (2) deferring to the bailiff in deciding whether she should remain shackled, and (3) not sua sponte instructing the jury that the shackles had no bearing on the determination of her guilt.

A. Background

1. 30-day continuance of original July trial date

The original trial call in this matter was set for July 9. On that date, the Honorable Richard S. Whitney granted a defense motion for a 30-day continuance and reset the trial to August 8.

2. August 8 dress-out orders

On August 8, at the request of defense counsel Fred T. Uebbing, the Honorable Jeffrey F. Fraser issued an order that Joy be "dressed out" in street clothes in court starting August 9 and continuing through the conclusion of the trial, and ordered the parties to report forthwith to the Honorable Julia Craig Kelety.

Judge Kelety denied a defense motion for another continuance, twice ordered Joy to be dressed out in street clothes in court, and ordered the parties to return the following morning.

3. August 9: Jury views Joy dressed out in street clothes

During the morning session on August 9, despite the dress-out orders and before the court brought in the jury panel for voir dire, Uebbing informed the court that, for tactical reasons, he had decided that Joy, who was present in the courtroom dressed out in street clothes, should be dressed in her jail clothes during trial. Calling the court's dress-out orders "illegal," Uebbing stated, "I have won every single case I've ever done where I didn't dress out my client." When the court asked that the jury panel be brought in, Uebbing stated:

"As far as I'm concerned, the Court has basically prejudiced my defense by making an illegal order to me and then arbitrarily dressing out a client that I've made a decision not to dress out, because I win when they're not dressed out. [¶] You bring the jury in, this panel is disqualified. I would suggest you stop right now and think about it."

The court then stated, "Bring them in," and Uebbing continued:

"And I can give you the names of the cases and the judges, starting with Napoleon Jones in 1986."

The prospective jurors then entered the courtroom, the roll was taken, and voir dire began.

Later, apparently outside the presence of the prospective jurors,⁴ the court asked Uebbing, "[D]o you want to briefly make your record with regard to the qualifications of the panel?" The following exchange, in which Uebbing requested a mistrial, took place between Uebbing and the court:

"[Uebbing]: Your Honor, the Court ordered me and was silencing me--and I think it was the last thing the Court said, then walked out of the room so there was no way for me even to respond to it--ordered me to dress out my client. That is flagrantly illegal. Every single judge asks counsel whether or not they want their client dressed out.

"The Court: Okay.

"[Uebbing]: That's number one, so it's an illegal order. [¶] Number two, I historically have done a number of cases with women over the years--for 20 years, where I did not dress them out, and it was a very

⁴ The reporter's transcript does not clearly indicate whether the following exchange occurred outside the presence of the prospective jurors. Given the nature of the statements, we assume it did occur outside the presence of the prospective jurors. The court's minutes indicate that all the prospective jurors were excused for lunch before 12:05 p.m., at which time the court denied the defense motion for a mistrial.

effective tool for me and it assisted me in winning my cases. None of these people [was] ever convicted of anything. And as a consequence, you have basically mistried this case by making an illegal order, vanishing, and then dressing my client out.

"The Court: Okay."

The court again asked Uebbing why he objected to the general qualifications of the jury panel. Uebbing replied:

"I made that objection. I just made it a moment ago. My client is dressed out. My strategy was not to have her dressed out. [¶] . . . [¶] They have seen her dressed out."

The court told Uebbing, "I will look forward to receiving your points and authorities on that issue. Until I receive those and make a contrary order, [Joy] will be dressed out." The court then denied the defense motion for a mistrial and declared the proceedings in recess for the lunch break.

During the afternoon session on August 9, the jury and two alternates were sworn in, and the court then excused the prospective jurors, the jurors and the alternates.

4. August 10: Joy appears before the jury in jail clothes and shackled

The following morning, Friday, August 10, Uebbing asked the court outside the presence of the jury for a continuance of the trial to the following Monday, stating he had not slept in three days, he was unable to focus, and he was not competent to represent Joy. The court asked Uebbing to take a seat and said, "We're taking things one at a time." The court first addressed Joy's refusal to dress out.⁵ The court stated for the record that

⁵ The record indicates that Joy was not yet present in court.

on August 8 Uebbing requested and obtained an order signed by Judge Fraser directing that Joy be dressed out starting August 9 and continuing through the conclusion of the trial, and on August 9 the court twice ordered that Joy dress out.

The court also indicated that when the trial began, as the jury was standing outside in the hall, Uebbing for the first time claimed he wanted his client to appear in jail clothes as was his practice. The court found this claim was a "complete fabrication" and a way to force the court to trail the jury trial because Uebbing was going to say his client would be denied her right to a trial if she were not dressed in street clothes. The court stated its conclusion that "this dress-out issue is simply a stalling tactic and an attempt to force a mistrial by [Uebbing]." The court asked Uebbing whether he was going to follow the court's order or whether he was going to continue to direct Joy to not dress out in street clothes. Uebbing replied:

"Judge, the Sixth Amendment right to effective assistance of counsel and the equivalent constitutional provision in the California Constitution overruled any order that you make. You can find me in contempt. Go ahead."

The court responded:

"Okay. Mr. Uebbing, you are cited for contempt. The contempt proceeding will take place immediately upon the discharge of the jury in this case."

Uebbing consulted with Joy, and the court asked her, "Are you willing to follow the orders of the court until such time as a new order is entered?" Joy replied, "Yes, I am." The court indicated it was going to resolve some other matters and then they would

take a break to allow Joy to get dressed in "appropriate clothing." Later, the court ordered a recess to allow Joy to dress out.

When the August 10 morning session resumed outside the presence of the jury, the court stated its understanding that Joy had decided she did not wish to dress out. The court asked Uebbing whether he was asking the court to rescind the dress-out order so that Joy could appear in jail clothes. Uebbing stated he was not trying to be insolent or nasty, but the dress-out order was optional. The court denied Uebbing's request to adjourn the proceeding until 2:00 or 3:00 p.m., and asked him whether he wanted his client to appear in street clothes. The court asked him again, and Uebbing replied he wanted Joy to appear before the jury dressed in "[j]ail blues." When the court indicated Uebbing was moving to rescind the court's order, Uebbing interrupted the court and said:

"I'm not making any motions, and I'm not asking you to rescind Judge Fraser's order. I'm telling you it's an optional order, and every attorney in this courthouse and every judge knows it except you."

After further discussion, the court stated:

"[I]f [Joy] wishes to waive her right to be tried in civilian clothes, I'm perfectly happy to allow her to appear in jail blues, if that is your determination of what is the appropriate approach to this case."

The court asked Uebbing, "[A]re you willing to waive your client's right to be tried in civilian clothes today?" Uebbing replied:

"No. You're in an area that you don't belong. [¶] . . . [¶] The thing is, you're interfering with my decision-making process."

Finding that Uebbing was posing an immediate threat to the administration of justice by refusing to answer a direct question, the court stated:

"Does your client waive or not waive her right to be tried in civilian clothes today? If you do not answer that question with an answer of 'waived' or 'not waived,' then I am going to find you in contempt. I am warning you that failure to answer the question I'm about to pose will result in a contempt citation. [¶] I am asking you now: Does [Joy] waive her right today to be tried in civilian clothes? Yes or no?"

Uebbing replied:

"This is going to be a great test case, and I'll probably have the whole bar in the State of California in your courtroom. [¶] . . . Go ahead. I mean, this is my decision, and if you want to make it a test case, make it a test case."

The court then cited Uebbing for contempt for violating the court's order and proceeding "in a fashion that intends to obstruct the progress of this case." The court indicated it would hold the contempt hearing contemporaneously with the other contempt matters upon the discharge of the jury. The court made a finding that Uebbing felt it was in Joy's best interest to wear jail clothes in front of the jury "because of the kind of case it is, and because of your experience as a trial lawyer and a criminal defense lawyer." The court also stated:

"That's a decision that I defer to and respect. It's in some degree unusual, but I think you've outlined that you've had success in doing that, and it is [an] appropriate trial strategy."

The court also found that Uebbing waived Joy's right to be tried in civilian clothing, notwithstanding Uebbing's refusal to "answer the Court's direct order," and indicated it would advise the jury to draw no adverse inferences from the fact that Joy was not dressed in "appropriate clothing."

Out of the presence of the jury, Joy appeared in the courtroom dressed in jail clothes and wearing shackles consisting of a circular waist chain that went around her waist and had two handcuffs attached to either side. The jury was thereafter brought into the courtroom, and the court gave preliminary jury instructions, including instructions that the jury should completely disregard how Joy was dressed. Specifically, the court told the jury:

"[T]oday [Joy] is dressed in what we call jail blues. That's clothing that she and her counsel -- well, that's the clothing that she's wearing today, and what's important is that that doesn't have anything to do with the case. For whatever reason that she's in jail clothes today has nothing to do with the case. The evidence that we're going to be hearing is what the jury will consider. So I'm going to ask you now and throughout the case to completely disregard and do not consider for any purpose the manner in which [Joy] is dressed today."

The prosecutor gave his opening statement. When the court invited Uebbing to give his opening statement, he stated for the first time, in the presence of the jury, that his client was handcuffed, and her election to wear jail clothes did not entitle the court to handcuff her. Uebbing stated, "It's an unlawful restraint, and I'm not going forward until the restraint is lifted, period." The court then asked the jury to step outside.

Outside the jury's presence, the court stated to Joy's counsel:

"Mr. Uebbing, your client has been sitting here for two hours and eight minutes exactly as she is now, and you wait to say this in front of the jury? I find that absolutely outrageous"

Uebbing interrupted the court, and the court cited him for contempt for the interruption. The court directed Uebbing to make his record about the restraints.

Uebbing requested that the proceedings be tape recorded, stating, "[Y]ou are lying about

the interruptions" and "I am not interfering with the words coming out of your mouth." Uebbing also said he "[had] a tendency to insert quickly" and "that's what's happening. And if these things had been recorded, that would be very clear." The court denied Uebbing's request to tape record the hearing.

The court again asked Uebbing, "What do you wish with regard to your client's chains, for which she has been sitting here for two hours?" Uebbing responded:

"Your Honor, the way this goes is you make your statement, you make it definitive, and you will not permit me to respond. [¶] Many times you have left the bench after you have made one of these statements, and the court reporter simply stops -- [¶] . . . [¶]--and he doesn't write anything more after that."

Stating "Mr. Uebbing, we're done," the court told Uebbing:

"I'm going to deny your request to have the jury [*sic*] shackled. I'm going to direct you not to mention -- to have your client unshackled. I believe it's a security issue. [¶] Is that right?"

When Uebbing replied, "Was she shackled when she was in normal clothes?", the court asked the bailiff, "[C]an you inform me?" The bailiff stated, "If you cho[o]se to keep her in jail blues, therefore [*sic*] the chains stay on." Upon further objection from the defense, the court stated, "At any rate, that's how we're proceeding. Take it up with the Court of Appeal."

Joy remained shackled for the entire morning session of the first day of trial, which included the defense's opening statement and part of Degnan's testimony.

Before the lunch break, outside the presence of the jury and after apologizing for getting upset, Uebbing again requested that Joy be unshackled, arguing that she was unable to assist in her own defense:

"[Joy is] not able to write notes to me, and she's very prolific. I have 50 or 60 pages from her which she's provided me from the jail. I would ask that she not be shackled so that she can continue to participate and help in her own representation. I also think it's unlawful to have her shackled."

a. *Order to remove the shackles*

After taking the matter under advisement, the court ruled on the shackling issue before the jury was brought back for the August 10 afternoon session. The court found there was no manifest need for restraints and ordered that Joy be unshackled forthwith:

"After consultation with the deputies, I'm convinced there is no manifest need in this case for [Joy] to be shackled, and the deputies have agreed that there is no need for that. So I will order that from this point on, barring some new and unforeseen facts that might come to light, that [Joy] appear in court unshackled."

The court also made the following observations:

"I do think it's important to state for the record what exactly we're talking about, and I'm informed that the shackling that was involved in this case involved a waist chain, which is a circular chain that goes around the person's waist, that has two handcuffs attached to either side. That's what was worn and was objected to by [Uebbing]. No leg shackles are involved in this case. [¶] I further will note for the record that any observation of the jury would have been quite brief, particularly in that when [Joy] was seated, I do not believe the shackles were observable. They certainly are not observable to me, and I'm seated . . . almost directly in front of [Joy], and at elevation, whereas the jury is to the side and not elevated, and furthermore blocked by a number of impediments in the courtroom, from seeing what is below the table. These are tables that are skirted, so nothing below table level could be seen. [¶] However, having a chance to review the authorities and consider [Uebbing's] motion for mistrial, I stand by my decision. The observation was brief. The decision has already been made to inform the jury that because of her garb[, Joy] is in jail. So I continue to deny that."

In response, Uebbing commented:

"When my client stands up, you can see she is shackled. If you're walking to the jury box and you look over at her, you can see she's shackled, unless perhaps my body is blocking her view. She stands up when they come in, they see the shackles. So it's probable that some of the jurors knew that she was shackled. I appreciate the fact that the Court has taken them off."

B. Applicable Legal Principles

In *Deck v. Missouri* (2005) 544 U.S. 622, 629 (*Deck*), the United States Supreme Court held that the right to due process of law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution "prohibit[s] the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." The high court explained that "courts cannot routinely place defendants in shackles or other physical restraints visible to the jury The constitutional requirement, however, is not absolute. It permits a judge, in the exercise of his or her discretion, to take account of special circumstances, including security concerns, that may call for shackling." (*Id.* at p. 633.) The *Deck* court recognized the need to restrain dangerous defendants to prevent courtroom attacks, and the need to give trial courts latitude in making individualized security determinations. (*Id.* at p. 632.) It also advised that such determinations must be case specific, "that is to say, it should reflect particular concerns, say, special security needs or escape risks, related to the defendant on trial." (*Id.* at p. 633.) The Supreme Court concluded that "where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual

prejudice to make out a due process violation. The State must prove 'beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained.' (*Chapman v. California* [(1967)] 386 U.S. 18, 24 [(*Chapman*)].)" (*Deck, supra*, 544 U.S. at p. 635.)

The California Supreme Court has followed similar principles by holding that "a defendant may be physically restrained at trial only if there is a 'manifest need for such restraints.' [Citation.]" (*People v. Seaton* (2001) 26 Cal.4th 598, 651 (*Seaton*), quoting *People v. Duran* (1976) 16 Cal.3d 282, 291 (*Duran*); see also § 688 ["No person charged with a public offense may be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge"].) The high court has also explained:

"Such a "[m]anifest need" arises only upon a showing of unruliness, an announced intention to escape, or "[e]vidence of any nonconforming conduct or planned nonconforming conduct which disrupts or would disrupt the judicial process if unrestrained" [Citation.] 'Moreover, "[t]he showing of nonconforming behavior . . . must appear as a matter of record The imposition of physical restraints in the absence of a record showing of violence or a threat of violence or other nonconforming conduct will be deemed to constitute an abuse of discretion.'" *(People v. Hill* (1998) 17 Cal.4th 800, 841 (*Hill*); see also *People v. Vance* (2006) 141 Cal.App.4th 1104, 1112.)

The decision whether to shackle a defendant may not be delegated to security or law enforcement personnel; the trial court must make its own determination regarding restraints. (*Hill, supra*, 17 Cal.4th at p. 841; *People v. Vance, supra*, 141 Cal.App.4th at p. 1112.)

The California Supreme Court has stated that it has "consistently found any unjustified or unadmonished shackling harmless where there was no evidence it was seen

by the jury. [Citations.]" (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 583-584.) "Even a jury's brief observations of physical restraints generally have been found nonprejudicial. [Citations.]" (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1213.)

The California Supreme Court has not determined which harmless error standard applies when a court abuses its discretion by permitting a defendant to be shackled in a manner visible to the jury and without manifest need in violation of *Duran, supra*, 16 Cal.3d at page 291. In *People v. McDaniel* (2008) 159 Cal.App.4th 736 (*McDaniel*), the Court of Appeal recently indicated the harmless error standard announced in *Chapman, supra*, 386 U.S. at page 24, applies in such cases, stating: "[U]njustified shackling is error of federal constitutional dimension and compels reversal unless the state demonstrates beyond a reasonable doubt that the shackling did not contribute to the verdict." (*McDaniel, supra*, 159 Cal.App.4th at p. 745, citing *Deck, supra*, 544 U.S. at p. 635.) We agree with *McDaniel* and hold that when a trial court abuses its discretion by permitting a defendant to be shackled without a manifest need for such restraints and in a manner visible to the jury, such shackling error is error of federal constitutional dimension that compels reversal of the judgment unless the state demonstrates beyond a reasonable doubt under the *Chapman* harmless error standard that the shackling did not contribute to the verdict. (*McDaniel, supra*, 159 Cal.App.4th at pp. 742, 745; *Deck, supra*, 544 U.S. at p. 635; see *Chapman, supra*, 386 U.S. at p. 24.)

C. Analysis

Applying the foregoing principles, we first conclude the court prejudicially abused its discretion and violated Joy's right to due process of law and a fair trial guaranteed by

the Fifth and Fourteenth Amendments to the United States Constitution by allowing Joy to be shackled during the morning session of the August 10 trial proceedings, in a manner that was visible to the jury, without justification by any legitimate state interest. As already discussed, under federal constitutional standards restraints must be "justified by a state interest specific to [this] particular trial" (*Deck, supra*, 544 U.S. at p. 629); under state standards there must be a "manifest need" for the restraints (*Seaton, supra*, 26 Cal.4th at p. 651). As we now explain, neither set of standards was satisfied.

The record indicates that Joy, who was dressed in jail clothes as a defense tactic at the insistence of her trial counsel, entered the courtroom at around 10:19 a.m. on August 10 wearing shackles that consisted of a circular waist chain and handcuffs attached to each side of the waist chain. There is nothing in the trial record to indicate that either the court, defense counsel, or the prosecutor expressed any concern at that time about the fact that Joy was shackled.

Although the reporter's transcript does not indicate whether Joy was standing when the jury was brought into the courtroom at 10:34 a.m., about 15 minutes after Joy arrived in shackles, defense counsel later asserted, without objection by either the court or the prosecutor, that "[Joy] stands up when [the jurors] come in, [and] they see the shackles." The court stated (at that later time) its belief that any observation by the jury of the shackles "would have been quite brief, particularly in that when [Joy] was seated, I do not believe the shackles were observable." The court's statement, however, tacitly acknowledged there were moments during the proceedings when Joy was not seated. Because the restraints consisted of a waist chain to which handcuffs were attached on

either side, we may reasonably infer they would have been visible to the jury when Joy was standing.

To avoid undue prejudice to Joy and protect her right to a fair trial as a matter of due process, the court had a duty upon her shackled arrival in the courtroom to sua sponte determine, outside the presence of the jury, whether the restraints were "justified by a state interest specific to [this] particular trial" (*Deck, supra*, 544 U.S. at p. 629), or whether there was a "manifest need" for the restraints (*Seaton, supra*, 26 Cal.4th at p. 651). The court erred by failing to make such a determination at that time. Although the court in good faith admonished the jury to completely disregard how Joy was dressed, such admonishment had the practical effect of drawing the jury's attention to the jail clothes Joy was wearing, thereby increasing the likelihood the jury would notice she was shackled.

As Joy's counsel, Uebbing had a duty to bring the shackling to the attention of the court before the jury entered the courtroom and to request removal of those restraints absent a manifest need for them. By failing to do so, Uebbing provided ineffective assistance to Joy's detriment. Uebbing did not challenge the shackling until after the jury entered the courtroom and after the prosecutor gave his opening statement. When he finally objected to the restraints at around 11:08 a.m., Uebbing virtually guaranteed his client would continue to suffer prejudice by repeatedly drawing the jury's attention to the shackling. He first stated in the presence of the jury:

"My client is handcuffed. She's not supposed to be handcuffed."

The court did not immediately seek to regain control of the proceedings by ordering Uebbing to approach the bench for a sidebar conference or by excusing the jury until the matter could be resolved. Instead, the court said:

"Excuse me, Mr. Uebbing. The question is do you wish to proceed with opening statement right now?"

Uebbing responded, again in the presence of the jury:

"I'd like to have my client unhandcuffed. Her election to wear the jail blues does not entitle this Court to handcuff her."

As the court was directing Uebbing that "we'll take that up afterwards," Uebbing interrupted the court and said, again in the presence of the jury:

"It's an unlawful restraint, and I'm not going forward until the restraint is lifted, period."

At this point, the court finally asked the jury to step outside the courtroom.

Although the court then properly chastised Uebbing outside the presence of the jury, finding his behavior "absolutely outrageous," it committed another error by delegating to the bailiff the decision whether to keep Joy shackled. The record shows that after the jury left the courtroom, the court indicated it was going to deny Uebbing's request to unshackle Joy, stating its belief that "it's a security issue." Uebbing then rhetorically asked:

"Was she shackled when she was in normal clothes?"

The court asked the bailiff for information, and the bailiff replied:

"The reason she is not shackled when she's dressed out is for the bias purpose. If you cho[o]se to keep her in jail blues, therefore [*sic*] the chains stay on. There's no reason for them not to be."

Upon further objection from the defense, the court issued its ruling, stating:

"[T]hat's how we're proceeding. Take it up with the Court of Appeal."

The court thus essentially indicated it would keep Joy shackled in accordance with the bailiff's decision that she should be shackled because she was dressed in jail clothes. By abdicating to the bailiff its responsibility to determine whether Joy should remain shackled, the court abused its discretion. (*Hill, supra*, 17 Cal.4th at p. 841 ["A trial court abuses its discretion if it abdicates this decisionmaking responsibility to security personnel or law enforcement"].)

The court's decision to deny Joy's request for removal of her shackles was also an abuse of the court's discretion and a violation of her right to due process of law because nothing in the record indicated the restraints were justified by a state interest specific to Joy's trial within the meaning of *Deck, supra*, 544 U.S. at page 629, nor was there any showing of a manifest need for the restraints within the meaning of *Seaton, supra*, 26 Cal.4th at page 651. As already discussed, *Deck* recognized that a trial court is allowed, in the exercise of discretion, to take account of special circumstances, including security concerns, that may call for shackling to, for example, restrain dangerous defendants or prevent them from escaping. (*Deck, supra*, at pp. 632-633.) In *Seaton* and *Hill*, the California Supreme Court recognized that a manifest need for restraints arises upon a showing of violence, a threat of violence, unruliness or other nonconforming behavior disruptive of the judicial process. (*Seaton, supra*, 26 Cal.4th at p. 651; *Hill, supra*, 17 Cal.4th at p. 841.) Here, nothing in the record shows that Joy was dangerous or unruly

while in the courtroom or that she presented an escape risk or that she engaged in any other kind of actually or potentially disruptive nonconforming conduct. After erroneously ordering Joy to remain shackled during the morning session of the first day of her trial, the court itself acknowledged following the lunch recess that the restraints were not justified by any manifest need.

Even if the court's decision to keep Joy in shackles had been justified and in compliance with constitutional standards, it committed instructional error. If a defendant's restraints are within view of the jury, the court has a sua sponte duty to instruct the jury that the restraints have no bearing on the determination of the defendant's guilt. (*Duran, supra*, 16 Cal.3d at pp. 291-292.) We have already concluded Joy's restraints were within view of the jury. The court thus erred by failing to sua sponte instruct the jury that Joy's shackles had no bearing on the determination of her guilt.⁶ (*Ibid.*)

Because the court's errors are of federal constitutional dimension, we proceed to review them under the harmless error standard announced in *Chapman, supra*, 386 U.S. at page 24. (*Deck, supra*, 544 U.S. at p. 635; *McDaniel, supra*, 159 Cal.App.4th at pp. 742, 745.) Under the *Chapman* standard, "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the

⁶ CALJIC No. 1.04 provides: "The fact that physical restraints have been placed on defendant [] must not be considered by you for any purpose. They are not evidence of guilt, and must not be considered by you as any evidence that [he] [she] is more likely to be guilty than not guilty. You must not speculate as to why restraints have been used. In determining the issues in this case, disregard this matter entirely."

constitutional error was harmless beyond a reasonable doubt." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681.)

Here, the People acknowledge no manifest need was shown to justify the use of the waist chain and handcuffs, but maintain the trial court's errors were harmless beyond a reasonable doubt because it was unlikely the jury saw the restraints for a long period of time, if at all; Joy chose to dress in jail clothes, and thus the jury already knew she was in custody; the jury acquitted her of several of the charges, demonstrating that one cannot find that the restraints impacted the jury's deliberations regarding her guilt or innocence; and there was overwhelming evidence of her guilt.

After reviewing the entire record, we cannot conclude with confidence that the court's constitutional errors were harmless beyond a reasonable doubt. We reject the People's contention it is unlikely the jury saw the shackles for a long period of time, if at all. The record supports a reasonable finding that Joy, while shackled, stood up in view of the jury, and Uebbing drew the jury's attention to the shackles. The unexplained and unjustified shackling created great potential for prejudice by conveying to the jury, falsely, that Joy was dangerous while in the courtroom. Uebbing's statements to the court after the jury was excused for the lunch recess indicated that Joy had been an active participant in her own defense, and the shackles prevented her from writing notes to him during the morning session on August 10 when Degnan, one of the prosecution's key witnesses, testified. Although some strong circumstantial evidence supported Joy's convictions of counts 2, 3, 8 and 9, the jury acquitted her of six other counts.

In sum, we cannot conclude the court's constitutional errors were harmless beyond a reasonable doubt. Accordingly, the judgment must be reversed. (*Deck, supra*, 544 U.S. at p. 635; *McDaniel, supra*, 159 Cal.App.4th at pp. 742, 745.) We also conclude that Uebbing's conduct in this matter was unprofessional and both disrespectful and insulting toward the court.⁷ As already discussed, he also provided ineffective assistance with regard to the shackling issue.

DISPOSITION

The judgment is reversed.

NARES, J.

WE CONCUR:

McCONNELL, P. J.

HALLER, J.

⁷ We take judicial notice of the following related matters: On September 5, Uebbing filed in this court a petition for writ of habeas corpus (D051547) in which he challenged his conviction by Judge Kelety of four counts of contempt arising out of Uebbing's representation of Joy on August 9 and 10 in the instant case (SCD 203857). By order dated September 17, this court summarily denied Uebbing's petition. On October 17, the California Supreme Court denied Uebbing's petition for review in that matter. On November 2, Uebbing filed in this court a second petition for writ of habeas corpus (D051919), urging that the proceedings on his contempt citations be reviewed as part of the instant appeal. By order dated November 2, this court summarily denied the petition. On November 5, Uebbing filed in this court a third petition for habeas corpus (D051929), claiming the court improperly increased his sentence. By order dated November 6, this court summarily denied the petition.